

proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSEArca-2021-47).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Jill M. Peterson,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-095, OMB Control No. 3235-0084]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Extension:
Rule 17Ac2-1

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the previously approved collection of information provided for in Rule 17Ac2-1 (17 CFR 240.17Ac2-1), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17Ac2-1, pursuant to Section 17A(c) of the Exchange Act, generally requires transfer agents for whom the Commission is the transfer agent’s Appropriate Regulatory Agency (“ARA”), to file an application for registration with the Commission on Form TA-1 and to amend their registrations under certain circumstances.

Specifically, Rule 17Ac2-1 requires transfer agents to file a Form TA-1 application for registration with the Commission where the Commission is their ARA. Such transfer agents must also amend their Form TA-1 if the existing information on their Form TA-1 becomes inaccurate, misleading, or incomplete within 60 days following the date the information became inaccurate, misleading or incomplete. Registration filings on Form TA-1 and amendments thereto must be filed with the Commission electronically, absent an exemption, on EDGAR pursuant to Regulation S-T (17 CFR 232).

The Commission annually receives approximately 199 filings on Form TA-1 from transfer agents required to register as such with the Commission. Included in this figure are approximately 167 amendments made annually by transfer agents to their Form TA-1 as required by Rule 17Ac2-1(c) to address information that has become inaccurate, misleading, or incomplete and approximately 32 new applications by transfer agents for registration on Form TA-1 as required by Rule 17Ac2-1(a). Based on past submissions, the staff estimates that on average approximately twelve hours are required for initial completion of Form TA-1 and that on average one and one-half hours are required for an amendment to Form TA-1 by each such firm. Thus, the subtotal burden for new applications for registration filed on Form TA-1 each year is approximately 384 hours (12 hours times 32 filers = 384) and the subtotal burden for amendments to Form TA-1 filed each year is approximately 251 hours (1.5 hours times 167 filers = 250.5 rounded up to 251). The cumulative total is approximately 635 burden hours per year (384 hours plus 251 hours).

Of the approximately 635 hours per year associated with Rule 17Ac2-1, the Commission staff estimates that (i) sixty percent (380.7 hours) are spent by compliance staff at an estimated hourly wage of \$283, for a total of \$107,738.10 per year (380.7 hours × \$283 per hour = \$107,738.10 per year; (ii) forty percent (253.8 hours) are spent by attorneys at an estimated hourly wage of \$380, for a total of \$96,444 per year (253.8 hours × \$380 per hour = \$96,444 per year); and (iii) the total internal cost of compliance associated with the Rule is thus approximately \$204,182.10 per year (\$107,738.10 in compliance staff costs + \$96,444 in attorney costs = \$204,182.10 per year).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/

o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: August 18, 2021.

Jill M. Peterson,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92700; File No. SR-NYSE-2020-96]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Disapproving a Proposed Rule Change To Amend Its Rules Establishing Maximum Fee Rates To Be Charged by Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners

August 18, 2021.

I. Introduction

On December 2, 2020, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b-4 thereunder, ² a proposed rule change to delete the maximum fee rates for forwarding proxy and other materials to beneficial owners set forth in NYSE Rules 451 and 465 and Section 402.10 of the NYSE Listed Company Manual (“Manual”), and establish in their place a requirement for member organizations to comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such member organization is a member. The proposed rule change was published for comment in the **Federal Register** on December 21, 2020. ³

On February 1, 2021, pursuant to Section 19(b)(2) of the Act, ⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90677 (December 15, 2020), 85 FR 83119 (December 21, 2020) (“Notice”). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2020-96/srnyse202096.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30-3(a)(31).

disapprove the proposed rule change.⁵ On March 18, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On June 11, 2021, the Commission designated a longer period for Commission action on the proposed rule change.⁸

This order disapproves the proposed rule change because, as discussed below, the Exchange has not met its burden under the Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Section 6(b)(5) of the Act and, in particular, the requirements that the rules of a national securities exchange be designed to promote just and equitable principles of trade and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.⁹

II. Description of the Proposal

NYSE Rules 451 and 465, and the related provisions in Section 402.10 of the Manual, require NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and other materials to, beneficial owners on behalf of issuers.¹⁰ For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage, and other expenses incurred for a particular distribution.¹¹ This reimbursement structure stems from Rules 14b-1 and 14b-2 under the Act,¹² which impose obligations on issuers and nominees to ensure that beneficial owners receive proxy materials. These rules require

issuers to send their proxy materials to broker-dealers or banks that hold securities in street name, for forwarding to beneficial owners, and to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners.¹³ The Commission's rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that issuers must reimburse the nominees for "reasonable expenses" incurred.¹⁴

Currently, the Supplementary Material to NYSE Rule 451, which is cross-referenced by the Supplementary Material to NYSE Rule 465 and Section 402.10 of the Manual, establishes the maximum rates at which a NYSE member organization may be reimbursed for certain expenses incurred in connection with distributing proxy and other materials to beneficial owners. FINRA Rule 2251 also sets forth a schedule of maximum rates that is substantively identical to the rate schedule specified in NYSE Rule 451.¹⁵ As a result, any broker that is a FINRA member but not also a NYSE member is subject to the same maximum reimbursement rates as NYSE members. The rules of other self-regulatory organizations ("SROs") generally provide that member organizations must forward proxy and other materials if they receive "reasonable" reimbursement, but they do not specify any schedule of maximum permitted charges.¹⁶

The Exchange has proposed to amend Supplementary Materials .90-.96 to NYSE Rule 451 by deleting the provisions setting maximum reimbursement rates and replacing them with rule text stating that member organizations must comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such member organization is a member.¹⁷ The Exchange also has

proposed to delete the cross-reference to NYSE Rule 451.90-.96 in Supplementary Material .20 to NYSE Rule 465 and replace it with rule text that is identical to the proposed new language in Supplementary Material .90 to NYSE Rule 451.¹⁸ The Exchange stated that the proposed rule change is not intended to take a position on the appropriateness of the fee schedules for proxy and other distributions currently set forth in NYSE Rules 451 and 465 or in the rules of any other SRO.¹⁹

According to the Exchange, since all NYSE member organizations that are subject to the fee schedule set forth in NYSE Rule 451 (and cross-referenced by NYSE Rule 465) are also FINRA member firms, the proposal would effectively require member organizations to comply with the fee schedule set forth in FINRA Rule 2251.²⁰ The Exchange acknowledged that it has historically taken the lead in establishing the maximum proxy distribution reimbursement rates, but stated that it does not believe the Exchange is best positioned to retain this responsibility going forward.²¹ The Exchange stated that all of the brokers who hold shares on behalf of customers in street name are FINRA members, while only a subset of them are members of the Exchange.²² The Exchange also stated that a large and increasing number of the affected issuers are listed on Nasdaq, CBOE, or other non-NYSE Group exchanges or are traded solely over the counter.²³ The Exchange further stated that the development of the mutual fund industry has led to the existence of a large number of issuers that are not listed on any exchange.²⁴

III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act,²⁵ the Commission shall approve a proposed rule change of an SRO if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to such organization.²⁶ The Commission shall disapprove a proposed rule change if it

replicates the fee schedule set forth in Supplementary Materials .90-.96 to NYSE Rule 451.

¹⁸ See proposed Supplementary Material .20 to NYSE Rule 465.

¹⁹ See Notice, *supra* note 3, 85 FR at 83120. As noted above, FINRA and NYSE American LLC presently are the only SROs besides NYSE with rules that set forth a fee schedule.

²⁰ See *id.*

²¹ See *id.*, 85 FR at 83119.

²² See *id.*, 85 FR at 83120.

²³ See *id.*

²⁴ See *id.*, 85 FR at 83119-20.

²⁵ See 15 U.S.C. 78s(b)(2)(C).

²⁶ See 15 U.S.C. 78s(b)(2)(C)(i).

⁵ See Securities Exchange Act Release No. 91025 (February 1, 2021), 86 FR 8420 (February 5, 2021).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 91359 (March 18, 2021), 86 FR 15734 (March 24, 2021) ("Order Instituting Proceedings").

⁸ See Securities Exchange Act Release No. 92154 (June 11, 2021), 86 FR 32301 (June 17, 2021).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ See NYSE Rules 451 and 465, and Section 402.10 of the Manual; Notice, *supra* note 3, 85 FR at 83119. The ownership of shares in street name means that a shareholder, or "beneficial owner," has purchased shares through a broker-dealer or bank, also known as a "nominee." In contrast to direct ownership, where shares are directly registered in the name of the shareholder, shares held in street name are registered in the name of the nominee, or in the nominee name of a depository, such as the Depository Trust Company. See Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530, 63531 n.14 (October 24, 2013) (order approving SR-NYSE-2013-07) ("2013 Approval Order").

¹¹ See NYSE Rules 451 and 465, and Section 402.10 of the Manual; 2013 Approval Order, *supra* note 10, 78 FR at 63531.

¹² 17 CFR 240.14b-1; 17 CFR 240.14b-2.

¹³ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, *supra* note 10, 78 FR at 63531.

¹⁴ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, *supra* note 10, 78 FR at 63531.

¹⁵ See Notice, *supra* note 3, 85 FR at 83119. The Exchange stated that FINRA Rule 2251 differs from NYSE Rule 451 in one respect. Specifically, FINRA has not adopted the Notice and Access fees for investment company shareholder report distributions set forth in Section 5 (Notice and Access Fees) of Supplementary Material .90 to NYSE Rule 451 as part of FINRA Rule 2251. See *id.*, 85 FR at 83119 n.8.

¹⁶ See *id.*, 85 FR at 83119. But see NYSE American LLC Rule 576.80 (setting forth a schedule of approved charges by member organizations in connection with proxy solicitations).

¹⁷ See proposed Supplementary Material .90 to NYSE Rule 451. The Exchange also proposes to delete Section 402.10 of the Manual, which

does not make such a finding.²⁷ The Commission's Rules of Practice, under Rule 700(b)(3), state that the "burden to demonstrate that a proposed rule change is consistent with the [Exchange] Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient."²⁸

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,²⁹ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³⁰ Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.³¹

For the reasons discussed below, the Commission is disapproving the proposed rule change because the information before the Commission is insufficient to support a finding that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission concludes that it does not have sufficient information to determine that the proposed rule change is consistent with Section 6(b)(5) of the Act and, in particular, the requirements that a national securities exchange's rules be designed to promote just and equitable principles of trade and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As an SRO, the Exchange bears the burden to demonstrate that any proposed rule change—whether a proposed new rule, or a proposed elimination of an existing rule—is consistent with the Act.³² As discussed

above, the Exchange has proposed to delete its long-standing and currently (and widely) relied-upon provisions setting maximum reimbursement rates, and instead provide that a NYSE member organization must comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such organization is a member. This effectively would make the maximum reimbursement rates set forth in FINRA rules the industry standard, and establish FINRA as the lead SRO in this area.³³ Accordingly, the Exchange bears the burden to demonstrate that approval of its proposal—which would result in a FINRA-led regime—would be consistent with the Act.

In the Notice, the Exchange expressed the view that FINRA is in a better position to take the lead in setting maximum reimbursement rates for the distribution of proxy and other issuer materials to beneficial owners because (1) all broker-dealers that hold shares in street name for customers are FINRA members, while only a subset of them are NYSE members, and (2) a large number of affected issuers are not listed on the Exchange.³⁴ In the Order Instituting Proceedings, the Commission stated that, because NYSE is a primary listing market, it has relationships with issuers as well as broker-dealers, and thus is well-positioned to take into account the views of both major stakeholder groups when reviewing and updating the maximum reimbursement rates.³⁵ The Commission stated that, unlike NYSE, FINRA does not have a relationship with issuers, who ultimately pay the reimbursement rates.³⁶ Further, the Commission stated that the Exchange had not explained why, in the absence of a relationship with this important constituency, FINRA is in a better position than NYSE to assume the leadership role in this area.³⁷ The Commission also stated that the Exchange had not explained why the fact that all broker-dealers are FINRA members puts FINRA in a materially better position to assume the leadership role in this area, or the significance of the fact that only a subset of impacted issuers are listed on NYSE, and only a subset of impacted broker-dealers are NYSE members, given that NYSE would appear well-positioned to consider the views of both of these constituencies, whereas FINRA would

not appear well-positioned to consider issuers' views.³⁸

In response to the Order Instituting Proceedings, the Exchange argued that being a listing exchange does not give it a meaningful advantage in the reimbursement rate-setting process because whether such rates are "reasonable" is necessarily based on the actual costs incurred by brokers, of which issuers have no first-hand knowledge.³⁹ In addition, the Exchange argued that FINRA is uniquely well-positioned to set reimbursement rates because, as the common regulator for all brokers whose business includes servicing street-name account holders, FINRA can review the actual costs incurred by brokers across the entire industry and their intermediaries.⁴⁰ The Exchange stated, in this regard, that only a subset of brokers that hold shares on behalf of customers in street name are NYSE members, and the NYSE members who engage in retail brokerage services primarily consist of larger, more established brokers, whereas FINRA's membership is more diverse, including smaller regional brokers and digital-only brokers that concentrate on serving retail customers.⁴¹

A broker bears an obligation to forward proxies and other issuer materials to beneficial owners with street name holdings, but that obligation is conditioned upon the broker receiving assurance from the issuer of reimbursement of the broker's reasonable expenses incurred in connection with performing that obligation.⁴² Under this framework, brokers and issuers are both inextricably involved in ensuring that beneficial owners with street name holdings receive proxies and other issuer materials.

The Exchange's arguments do not provide a sufficient basis for the Commission to find that the proposed rule change would be consistent with Section 6(b)(5) of the Act because the Exchange has not demonstrated how issuers' interests would continue to be adequately considered, and not unfairly discriminated against, in the reimbursement rate-setting process if the Exchange were to relinquish its lead

³⁸ See *id.*

³⁹ See letter from John Carey, Senior Director, NYSE, dated April 28, 2021 ("NYSE Response Letter"), at 2.

⁴⁰ See *id.* In this context, the Commission understands the Exchange's reference to "intermediaries" to be a reference to proxy service providers that coordinate the distribution of proxy or other materials for multiple nominees. See Section 1(a)(ii) of Supplementary Material .90 to Rule 451 (defining the term "intermediary").

⁴¹ See NYSE Response Letter at 2.

⁴² See 17 CFR 240.14b-1.

²⁷ See 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700(b)(3).

²⁸ See 17 CFR 201.700(b)(3).

²⁹ See *id.*

³⁰ See *id.*

³¹ *Susquehanna Int'l Group, LLP v. Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017).

³² See Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³³ See *supra* note 20 and accompanying text.

³⁴ See Notice, *supra* note 3, 85 FR at 83119–20.

³⁵ See Order Instituting Proceedings, *supra* note 7, 86 FR at 15737.

³⁶ See *id.*

³⁷ See *id.*

role in this area. The Commission is not foreclosing the possibility that issuers' interests could be adequately considered in a reimbursement rate-setting process that the Exchange does not lead; however, in the Notice and in its response to the Order Instituting Proceedings, the Exchange did not provide sufficient information in the record on this point. In particular, while the Exchange acknowledges that the impact of eliminating the reimbursement rate schedule from its rules would be that FINRA becomes the de facto lead SRO for rate setting,⁴³ the Exchange does not articulate or provide any information to suggest how FINRA, notwithstanding its lack of regulatory relationships with issuers, could potentially consider issuers' interests if FINRA were to become the industry standard-bearer.⁴⁴ Nor does the Exchange identify any other existing mechanism through which the interests of issuers could be adequately considered if proposed updates to the rates were to be developed under a FINRA-led regime.

In contrast, for the many years that the Exchange has been the lead SRO in this area, it has demonstrated the ability, as a primary listing market that has relationships with both brokers and issuers, to consider the interests of both

of these important constituencies when it periodically develops proposals to update the reimbursement rate schedule pursuant to Section 19(b)(2) of the Act. In so doing, the Exchange performs an important SRO function of generating proposals that provide a basis for the Commission to find that the proposed updated rates constitute an equitable allocation of reasonable fees.⁴⁵ As an outgrowth of this process and as approved by the Commission, the NYSE rate schedule sets the maximum level of "reasonable" reimbursement that is accepted as the industry standard for what may be sought by any broker and must be paid by any issuer. In turn, as a consensus product representing broker and issuer interests, the NYSE rate schedule helps ensure that beneficial owners receive proxy and other issuer materials in a timely manner and as required by the Commission's rules.

The Exchange's statements regarding FINRA's ability to consider brokers' costs do not evince a similar ability on FINRA's part to consider both broker and issuer interests in performing this SRO function. Moreover, while the Exchange asserts that its listing relationships with issuers do not provide it with a meaningful advantage in the reimbursement rate-setting process, the consideration of issuers' interests has been a fundamental part of the Exchange's process for determining what reimbursement rates would be "reasonable." Throughout the history of the NYSE reimbursement rates, which were formally established by rule in 1952 and have been updated periodically since then,⁴⁶ both issuers and brokers have been involved in the process of reaching a workable consensus as to what constitutes "reasonable" reimbursement.⁴⁷ The Exchange's own, most recent history on this point is illustrative. In 2010, the Exchange formed a Proxy Fee Advisory Committee, comprised of representatives of issuers, broker-dealers, and shareholders, to make recommendations for changes to the Exchange's then-existing reimbursement schedule;⁴⁸ and in 2013, when the last major revisions to the reimbursement schedule were proposed, the Exchange acknowledged that it has "long operated under the assumption that these fees

should represent a consensus view of the issuers and the broker-dealers involved."⁴⁹ The Exchange's historical approach underscores that the ability to duly consider both brokers' and issuers' interests—an ability that, based on the record here, FINRA does not possess—is critical to an equitable and fair process for determining what rates would constitute reasonable reimbursement, and helps assure that the rates are set in a manner that, consistent with Section 6(b)(5), promotes just and equitable principles of trade, protects investors and the public interest, and does not permit unfair discrimination between customers, issuers, brokers, or dealers.

In addition, the Exchange argued that its proposal would simply conform its rules to substantively identical rules of other exchanges, such as Cboe BZX Exchange and the Investors Exchange, that do not specify a schedule of maximum permitted reimbursement rates.⁵⁰ The mere fact that other exchanges' rules do not specify a reimbursement rate schedule does not demonstrate that the Exchange's proposal is consistent with the Act and must be approved, or that the circumstances that make those other exchanges' rules consistent with the Act apply equally to the Exchange.⁵¹ Indeed, the circumstances underpinning this proposal are unique because, as noted above, the NYSE rate schedule is the product of a NYSE-led process that considers broker and issuer interests

⁴³ See Notice, *supra* note 3, 85 FR at 83120.

⁴⁴ FINRA, along with several other commenters, opposed the proposal because FINRA, unlike the Exchange, has no regulatory relationship with issuers. See letters from: Marcia E. Asquith, Executive Vice President, FINRA, dated January 11, 2021 ("First FINRA Letter"), at 5, and dated April 14, 2021 ("Second FINRA Letter"), at 3; Niels Holch, Executive Director, Shareholder Communications Coalition, dated January 20, 2021 ("SCC Letter"), at 5; Todd J. May, President, Securities Transfer Association, Inc., dated March 1, 2021 ("First STA Letter"), at 2, and dated April 14, 2021 ("Second STA Letter"), at 5; Paul Conn, President, Global Capital Markets, Computershare, dated January 11, 2021 ("First Computershare Letter"), at 3–4, and dated April 14, 2021 ("Second Computershare Letter"), at 1. FINRA also stated that it is not in a better position than NYSE to become the lead SRO in this area, and that, should the Commission determine to approve the Exchange's proposal, FINRA would be strongly inclined to rescind its fee schedule as well. See First FINRA Letter at 5–6; Second FINRA Letter at 3. The Commission notes that any FINRA proposal to rescind its fee schedule would be subject to the rule filing process and Commission approval.

Commenters were divided on the desirability of retaining a fixed maximum rate schedule. See letters from: Thomas F. Price, Managing Director, Operations, Technology, Cyber & BCP, Securities Industry and Financial Markets Association, dated April 14, 2021, at 5 (recommending that the Commission ensure that at least one significant SRO retains a fixed maximum fee schedule); Sarah A. Bessin, Associate General Counsel, Securities Regulation, and Joanne Kane, Senior Director, Operations and Transfer Agency, Investment Company Institute, dated May 13, 2021 ("Second ICI Letter"), at 4 (stating that retaining a fixed SRO rate schedule would be an inappropriate means of broader reform). See also *infra* note 52.

⁴⁵ See 15 U.S.C. 78f(b)(4).

⁴⁶ See Concept Release on the U.S. Proxy Systems, Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42981, 42995 (July 22, 2010) ("Proxy Plumbing Release").

⁴⁷ See 2013 Approval Order, *supra* note 10, 78 FR at 63538 n.164.

⁴⁸ See Securities Exchange Release No. 68936 (February 15, 2013), 78 FR 12381, 12382 (February 22, 2013) (SR–NYSE–2013–07).

⁴⁹ See *id.* In fact, issuers may provide perspective not just based on their experience paying the NYSE reimbursement rates, but also based on their experience paying to distribute materials to registered owners who do not hold their shares in street name, which distributions do not involve brokers and are not subject to the NYSE rates. See Proxy Plumbing Release, *supra* note 46, 75 FR at 42986. Issuers typically contract directly with third-party service providers for distributions to registered owner accounts, just as brokers typically contract with third-party service providers for distributions to street name accounts. See *id.* While these different types of distributions might involve different costs and processes, issuers have insight into what it costs to pay a service provider to distribute proxies or other issuer materials that is relevant to the reimbursement rate-setting process. See, e.g., letter from Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, and Joanne Kane, Senior Director, Operations and Transfer Agency, Investment Company Institute, dated January 8, 2021 ("First ICI Letter"), at 2 and Second ICI Letter at 2–3 (comparing the costs that funds pay when they distribute materials through intermediaries to what they pay when they distribute materials directly to shareholders).

⁵⁰ See NYSE Response Letter at 2.

⁵¹ We note that, as set forth in Commission Rule of Practice 700(b)(3) (17 CFR 201.700(b)(3)), a "mere assertion . . . that another self-regulatory organization has a similar rule in place" is "not sufficient" to "explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization."

and is the industry standard that all brokers with street name accounts and issuers rely upon. Approval of NYSE's proposed elimination of its rate schedule therefore would do more than simply conform NYSE's rules to those of other exchanges; it would result in NYSE's relinquishment of an important market-wide regulatory function that it currently performs, and without there being evidence in the record of this filing of an available and equally viable alternative for that function.

When assessing this proposed rule change, the Commission must consider its consistency with the Act and the applicable rules and regulations issued thereunder.⁵² As stated above, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Exchange] Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."⁵³ For the foregoing reasons, the Exchange has not met its burden to demonstrate that it would be consistent with the Act for the Exchange to relinquish its current role in setting the maximum reimbursement rates that establish the industry standard. In particular, the Exchange has not adequately demonstrated that,

⁵² The Commission notes that almost all commenters urged comprehensive, Commission-led reform to the current reimbursement structure. See First FINRA Letter, Second FINRA Letter, First STA Letter, Second STA Letter, First Computershare Letter, Second Computershare Letter, SCC Letter, First ICI Letter, Second ICI Letter. See also letters from: Timothy W. McHale, Senior Vice President & Senior Counsel, Capital Research and Management Company, and Anthony M. Seiffert, Chief Compliance Officer, American Funds Service Company, dated January 11, 2021; Catherine L. Newell, General Counsel and Executive Vice President, Dimensional Fund Advisors LP, dated January 11, 2021; Peter J. Germain, Chief Legal Officer, Federated Hermes, Inc., dated January 11, 2021; Basil K. Fox, Jr., President, Franklin Templeton Investor Services, LLC, dated January 11, 2021; Heidi Hardin, Executive Vice President and General Counsel, MFS Investment Management, dated January 11, 2021; Thomas E. Faust Jr., Chairman and Chief Executive Officer, Eaton Vance Corp., dated January 14, 2021; Noah Hamman, Chief Executive Officer, AdvisorShares Investments, LLC, dated January 14, 2021; Timothy W. McHale, Senior Vice President & Senior Counsel, Capital Research and Management Company, and Anthony M. Seiffert, Chief Compliance Officer, American Funds Service Company, dated May 18, 2021; and Heidi Hardin, Executive Vice President and General Counsel, MFS Investment Management, dated May 19, 2021. The Commission must consider the proposed rule change that was filed, and thus such reform is beyond the scope of this proposed rule change. As noted above, the Exchange stated that the proposed rule change is not intended to take a position on the appropriateness of the fee schedules for proxy and other distributions currently set forth in NYSE Rules 451 and 465 or in the rules of any other SRO. See *supra* note 19 and accompanying text.

⁵³ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

in its absence from that role, issuer interests would continue to be considered and not unfairly discriminated against. As a result, the Commission does not have sufficient information to find that the Exchange's proposal would promote just and equitable principles of trade and protect investors and the public interest, and not permit unfair discrimination between customers, issuers, brokers, or dealers. Accordingly, the Commission must disapprove the proposal because the Exchange has not met its burden to demonstrate that the proposal is consistent with Section 6(b)(5) of the Act.⁵⁴

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Act, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Act.⁵⁵

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁵⁶ that the proposed rule change (SR-NYSE-2020-96) is disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁷

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92698; File No. SR-GEMX-2021-08]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX's Options Regulatory Fee

August 18, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 9, 2021, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission (the

⁵⁴ In disapproving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁵⁵ 15 U.S.C. 78f(b)(5).

⁵⁶ 15 U.S.C. 78s(b)(2).

⁵⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

"Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend GEMX's Pricing Schedule at Options 7, Section 5 related to the Options Regulatory Fee or "ORF".

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/gemx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, GEMX assesses an ORF of \$0.0018 per contract side as specified in GEMX's Pricing Schedule at Options 7, Section 5. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted GEMX's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection,